TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #96-20

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of Tennessee sales and use tax to fabrication, sale and installation of awnings.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

(A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
(B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
(C) The applicable law must not have been changed or amended;
(D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
(E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

FACTS

[THE TAXPAYER] is in the business of fabricating and installing custom awnings. A company representative measures the installation site and determines the size of awning needed. [THE TAXPAYER] then manufactures the awning and support structures which

consists of metal rods. None of the awnings are free standing structures. All awnings are installed on buildings by attaching the metal rod support structures to the buildings by means of screws and bolts.

In some cases, [THE TAXPAYER] retains an independent contractor to install the awnings for its customers. All of the awnings made by [THE TAXPAYER] are installed by [THE TAXPAYER'S] employees or by the company's independent contractors. No awnings are sold to any other contractor, fabricator, wholesaler or retailer. [THE TAXPAYER] states that its awnings are installed with the intent that they are to remain in place for their useful life. Once installed, the awnings are not moved from place to place or removed with the change in seasons.

When [THE TAXPAYER] contracts with a customer to provide custom manufactured and installed awnings, it charges the customer one lump sum which includes the awning itself and the installation. The customer is billed by the company and makes no separate payment to the installer.

ISSUES

1. Must [THE TAXPAYER] pay sales tax on its purchases of raw materials used in the fabrication of awnings?

2. May [THE TAXPAYER] use a resale certificate when purchasing raw materials used in the fabrication of awnings?

3. Should [THE TAXPAYER] charge sales tax to its customers on custom made awnings manufactured and installed for them?

4. If [THE TAXPAYER] must charge sales tax to its customers, to which of the following items will sales tax be applicable?

   (a) The value of the raw materials.

   (b) The value of labor to fabricate the awnings.

   (c) The profit or markup portion of the sales price.

   (d) The installation charges.

RULINGS

1. Yes.

2. No.

3. No.

4. Sales taxes are not applicable to any of [THE TAXPAYER]'s charges to its customers for awnings custom fabricated and installed.

ANALYSIS

1. PURCHASES OF MATERIALS AND SUPPLIES USED IN FABRICATION OF AWNINGS ARE SUBJECT TO TENNESSEE SALES TAX

[THE TAXPAYER] is a "person", as the term is defined in T.C.A. § 67-6-102(20), for Tennessee sales and use tax purposes. [THE TAXPAYER] is also a "dealer" according to the definition set forth in T.C.A. § 67-6-102(6)(K) which states that a dealer may be defined as a person who:

> Uses tangible personal property, whether the title to such property is in such person or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of such person's contract or to fulfill such person's contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid.

T.C.A. § 67-6-209(b), quoted in part below, imposes Tennessee use taxes on the use of tangible personal property by a contractor in fulfillment of a contract unless sales or use taxes have been previously paid on the property.

> Where a contractor . . . hereinafter defined as a dealer uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay sales or use tax, . . . such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-6-203 measured by the purchase price of such property, unless such property has been previously subjected to sales or use tax, and the tax due thereon has been paid . . .

As a general rule, when a contractor fabricates tangible personal property in a manner changing the form thereof and then uses the property, the Tennessee sales and use tax applies to the fair market value of the fabricated property. However, Departmental Rule 1320-5-1-1-.03(2) makes the following provisions concerning contractors who fabricate tangible personal property which they apply as a component part of a building.

> Contractors . . . and sub-contractors who are not in the business of selling tangible personal property which they fabricate to erect or apply as a component part of a building shall pay the sales or use tax on the purchase price of the materials and supplies used in connection with their contract work.

As will be seen in the analysis in item 3 below, [THE TAXPAYER] is not in the business of selling tangible personal property and the awnings fabricated by [THE TAXPAYER] are applied as component parts of buildings. The above quoted statutes and Departmental Rule make it clear that [THE TAXPAYER] must pay Tennessee sales and use taxes on the purchase price of materials and supplies it uses to fabricate awnings to be installed as a component part of buildings.

2. [THE TAXPAYER] MAY NOT USE A RESALE CERTIFICATE TO PURCHASE MATERIALS AND SUPPLIES USED TO FABRICATE AWNINGS

For purposes of the Tennessee sales tax, T.C.A. § 67-6-102(23(A) defines the term "retail sales" or "sale at retail as follows:

> "Retail sales" or "sale at retail" means a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale. "Retail sales" or "sales at retail means and includes all such transactions as the commissioner, upon investigation, finds to be in lieu of sales. Any sales for resale must, however, be in strict compliance with rules and regulations promulgated by the commissioner. Any dealer making a sale for resale which is not in strict compliance with rules and regulations shall be personally liable for and pay the tax;

Rule 1320-5-1-.68(3) of the Department's Sales and Use Tax Rules makes the following provisions concerning resale certificates:

> Certificates of resale may not be used to obtain tangible personal property or taxable services to be used by the purchaser, and not for resale; such use shall be grounds for the Commissioner to revoke the registration certificate of the dealer wrongfully making use of such certificate of resale. In addition to this penalty, it is a misdemeanor to misuse the certificate of registration and resale certificates for the purpose of obtaining tangible personal property or taxable services without the payment of the Sales or Use Tax when it is due.

A dealer who is a retailer may purchase tangible personal property for resale without payment of Tennessee sales and use taxes if he furnishes his supplier with the appropriate resale certificate. However, as will be seen in the analysis in item 3 below, [THE TAXPAYER] is not a retailer in the business of selling tangible personal property. The

materials and supplies being purchased by [THE TAXPAYER] are not resold, but are used by [THE TAXPAYER] in the performance of its contracts to fabricate and install custom made awnings on buildings. Therefore, [THE TAXPAYER] can not use a resale certificate to purchase the materials and supplies it uses to fabricate awnings.

3. CUSTOMERS ARE NOT REQUIRED TO PAY SALES TAX ON THE CHARGES MADE BY [THE TAXPAYER] FOR INSTALLED CUSTOM MADE AWNINGS

T.C.A. § 67-6-202(a) imposes the Tennessee sales tax as follows:

> For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied at the rate of six percent (6%) of the sales price of each item or article of tangible personal property when sold at retail in this state; . . .

Sales and Use Tax Rule 1320-5-1-.27 makes the following provisions concerning charges for installation of tangible personal property which becomes a part of real property:

> Charges made for installing tangible personal property which becomes a part of real property, are not subject to the Sales or Use Tax. The person so installing the property shall be liable for any Sales or Use Tax that may be due, if any, on property bought and/or used in making the installation.

Whether [THE TAXPAYER] should collect sales tax from its customers on charges made for installed custom awnings turns on whether the awnings are tangible personal property chattels or real property fixtures.

In Tennessee the primary test for distinguishing chattels from fixtures is not the manner in which the property is affixed to the freehold, but the intention with which the chattel is connected with the realty. Such intent may be shown by applying an objective test which considers the type of structure, the mode of attachment and the use and purpose of the property. *Harry J. Whelchel Company v. King*, 610 S.W.2d 710 (Tenn. 1980). Chattels are fixtures when they are so attached to real property that, from the intention of the parties and the uses to which such chattels are put, they are presumed to be permanently annexed. If the chattel is intended to be removable at the pleasure of the owner, it is not a fixture. *Magnavox Consumer Electronics v. King*, 707 S.W.2d 504 at 507 (Tenn. 1986) quoting *Hickman v. Booth*, 173 S.W. 438 (Tenn. 1914)

The test applied in *Whelchel* was also applied in *General Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241 (Tenn. 1974) where carpet was installed by the tackless strip method allowing easy removal. The carpet was held to be a fixture improving the real property because the parties intended to install the carpet permanently. The carpet was

installed with the intent that it remain attached to the realty for the length of its useful life to the owner of the realty.

The awnings which [THE TAXPAYER] fabricates are custom made to fit the buildings upon which they are installed. They are attached to the buildings by means of metal support rods which are secured to the building structure by means of screws and bolts. It is stated that the awnings are intended to remain attached to the realty without being removed for the length of their useful life. This is consistent with the general use of custom made awnings installed on buildings. The fact that the awnings are custom made to fit the buildings to which they are attached, their mode of attachment to the buildings, their use and purpose and the intent that they remain attached to the realty for the length of their useful life supports the conclusion that they become a part of the realty to which they are attached and are real property fixtures rather than tangible personal property chattels. This determination is consistent with the Tennessee Supreme Court's reference to an awning as a "fixture", the title to which passed with the realty, in *City of Knoxville v. Hargis*, 198 S.W.2d 555 at 558 (Tenn. 1946)

Since the awnings in question become a part of the realty when installed, the Tennessee sales and use tax does not apply to charges made for the awnings and their installation.

4. NONE OF [THE TAXPAYER]'S CHARGES TO ITS CUSTOMERS FOR AWNINGS CUSTOM FABRICATED AND INSTALLED ARE SUBJECT TO SALES AND USE TAXES

As has been shown in items 1 through 3 of the above analysis, none of [THE TAXPAYER]'s charges to its customers for awnings custom fabricated and installed are subject to Tennessee sales and use taxes. However, [THE TAXPAYER] must pay sales and use taxes on the materials and supplies it uses to fabricate the awnings.

Arnold B. Clapp, Senior Tax Counsel

APPROVED: Ruth E. Johnson, Commissioner

DATE: 6/18/96